Ernst & Young (sued as a firm) v SJ Asset Management Sdn Bhd (in liquidation) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-2311–11 OF 2017
TENGKU MAIMUN, HARMINDAR SINGH AND ABDUL KARIM JJCA
9 JANUARY 2019

Civil Procedure — Discovery — Discovery of documents — Appellant applied for discovery of documents pursuant to O 24 r 3 and/or r 7 of the Rules of Court 2012 — High Court dismissed appellant's application — Whether Securities Commission's authorisation was required in order for first respondent to disclose discovery documents — Whether learned judge erred in finding that the balance of public interest fovoured non-disclosure of discovery documents — Rules of Court 2012 O 24 — Securities Commission Malaysia Act 1983 s 148B — Securities Commission (Amendment) Act 2010 s 148 — Securities Commission (Amendment) Act 2010 ss 64(4), (8) & 148

SJ Asset Management Sdn Bhd ('the first respondent') was a licensed fund manager. In April 2010, the Securities Commission Malaysia ('the second respondent') appointed BDO Consulting Sdn Bhd ('BDO') to examine the first respondent's books, accounts and records ('2010 BDO examination'). The 2010 BDO examination led to an admission by the first respondent of certain regulatory breaches. BDO was then appointed as liquidator of the first respondent. In that capacity, BDO reported an alleged discrepancy between the trust assets that had been reported to the first respondent's clients and the trust assets held by the custodians. CIMB Investment Bank Bhd ('CIMB') and the investors (collectively referred to as 'the plaintiffs') then filed Suits 422 and 431 respectively against the first respondent for fraud; and against the appellant as the first respondent's auditor, on the basis that the appellant failed to detect the alleged fraud. Subsequently, the appellant filed an application for discovery pursuant to O 24 r 3 and/or r 7 of the Rules of Court 2012 ('the ROC') ('the discovery application'). In the discovery application, the appellant had sought documents and information ('the discovery documents') which were made available to the second respondent during the second respondent's supervisory assessment of the first respondent. The learned judge dismissed the appellant's application and held that notwithstanding that the discovery documents were relevant and necessary, the said documents fell within the ambit of s 148B of the Securities Commission Malaysia Act 1983 ('the SCMA 1993') and therefore ought not to be disclosed without the authorisation of the second respondent. Further, the learned judge accepted the second respondent's objection to disclosure on the grounds of public interest immunity. Aggrieved

by the decision, the appellant filed the present appeal. The issues arose were: (a) whether the second respondent's authorisation was required in order for the first respondent to disclose the discovery documents; and (b) whether the learned judge had erred in finding that the balance of public interest fovoured non-disclosure of the discovery documents.

Held, allowing the appeal and setting aside the order of the High Court:

(1) The learned judge was justified in coming to the findings that the discovery documents were relevant and necessary as necessitated by O 24 of the ROC. This was because the discovery documents contained evidence relevant to the issues in that suit and contained information which may advance the appellant's case or damage the plaintiffs' case against the appellant (see para 12).

(2) Suits 422 and 431 were instituted in 2012 when the s 148 that existed at the time was the one introduced by the Securities Commission (Amendment) Act 2010 ('the 2010 Amendment') which came into force on 1 April 2010. The 2010 Amendment allowed disclosure without the second respondent's authorisation 'for any purposes of the securities law or for the purpose of any civil or criminal proceedings under any written law'. In the present case, disclosure under the 2010 Amendment was permissible because the discovery documents were necessary for purposes of the securities laws (see paras 16–17).

(3) The learned judge took the position that it was the current s 148 introduced by the Securities Commission (Amendment) Act 2015 ('the 2015 Amendment Act') that was applicable as when the discovery application was heard on 2 October 2017, the 2015 amendment had taken effect. The present court could not accede to the learned judge's view on the applicable law. The Parliament's intention was to clearly preserve any rights which accrued prior to the amendment through s 64 of the 2015 Amendment Act. It was plain that the 'right' or 'privilege' acquired or which accrued under sub-s 64(4) and (8) of the 2015 Amendment Act included an application for discovery documents. In any event, the term 'legal proceedings' used in the same subsections could refer to the institution of the writ action by CIMB against the appellant on 30 April 2012 which was way before the effective date. It could not be restricted to the time when the discovery application was filed on 11 July 2017. As such, there was no need for the consent of the second respondent. For the same reasons, ss 148A and 148B which were also introduced by the 2015 Amendment Act were ineffective and could not deprive the appellant of its right to obtain disclosure (see paras 18–20).

(4) The criticism by the appellant that, the second respondent's generic reasoning in support of the claim to public interest immunity was vague, bare and unsubstantiated, was not without merit. Firstly, the disclosure of

A the discovery documents did not trigger any recognisable head of public interest immunity. Secondly, the deponent to the affidavit filed by the second respondent was not the appropriate person to properly consider the documents or the basis for the claim to immunity from disclosure. Thirdly, after determining that the discovery documents were relevant
B and necessary for a fair trial, the learned judge should not have refused to make an order for production without examining the documents and considering them in light of the other materials (see paras 32–33 & 36).

(5) In respect of the learned judge's reasons for refusing disclosure, the court
C was unable to ascertain how the investigative or supervisory powers of the second respondent would be affected as this was not explained in the affidavits. Further, any concerns about future investigations being affected and public confidence in the second respondent being undermined was unwarranted as there was simply no evidence of any
D ongoing or forthcoming investigations into the first respondent. The third reason concerning the floodgate effect was against the established jurisprudence as the law in the form of O 24 of the ROC allowed for discovery of documents in civil litigation. The court functioned as a gatekeeper, the fear of the floodgate effect was therefore unjustified and
E unfounded. Lastly, the reason given by the second respondent that the parties may be discouraged from giving evidence was speculative, unsupported and unfounded in principle (see paras 37–39 & 42).

(6) The learned judge's assessment of the balance of public interest was flawed and the final decision to disallow disclosure was unsupported by
F principle and by the evidence. The learned judge had failed to properly weigh the likelihood of harm that non-disclosure would cause to the party seeking disclosure and to the administration of justice as a whole. The learned judge appeared to have taken the mistaken view that once public interest immunity was raised by a statutory body, the decision on
G whether to allow or disallow discovery was absolutely in the hands of the statutory body. This proposition was wrong in law as the final decision on disclosure must lay with the court (see paras 44–45).

[Bahasa Malaysia summary

H SJ Asset Management Sdn Bhd ('responden pertama') adalah pengurus dana berlesen. Pada April 2010, Suruhanjaya Sekuriti Malaysia ('responden kedua') telah melantik BDO Consulting Sdn Bhd ('BDO') untuk meneliti buku, akaun dan rekod responden pertama ('pemeriksaan BDO 2010'). Pemeriksaan BDO 2010 membawa kepada pengakuan oleh responden pertama mengenai
I pelanggaran peraturan tertentu. BDO kemudian dilantik sebagai pelikuidasi responden pertama. Atas kapasitinya, BDO melaporkan percanggahan yang dikatakan antara aset amanah yang telah dilaporkan kepada klien responden pertama dan aset amanah yang dipegang oleh penjaga dana. CIMB Investment Bank Bhd ('CIMB') dan para pelabur (secara kolektif dirujuk sebagai 'plaintif')

kemudian memfailkan Guaman 422 dan 431 masing-masing terhadap responden pertama untuk penipuan; dan terhadap perayu sebagai juruaudit responden pertama, atas dasar bahawa perayu gagal mengesan penipuan yang dikatakan tersebut. Selanjutnya, perayu memfailkan permohonan penzahiran menurut A 24 k 3 dan/atau k 7 Kaedah-Kaedah Mahkamah 2012 ('KKM') ('permohonan penzahiran'). Dalam permohonan penzahiran, perayu telah memohon dokumen dan maklumat ('dokumen penzahiran') yang disediakan kepada responden kedua semasa penilaian penyeliaan responden kedua terhadap responden pertama. Hakim yang bijaksana menolak permohonan perayu dan memutuskan bahawa walaupun dokumen penzahiran itu relevan dan perlu, dokumen tersebut berada dalam lingkungan s 148B Akta Suruhanjaya Sekuriti Malaysia 1983 ('SCMA 1993') dan oleh itu tidak patut didedahkan tanpa kebenaran responden kedua. Tambahan pula, hakim yang bijaksana menerima bantahan responden kedua untuk pendedahan atas dasar imuniti kepentingan awam. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan ini. Isu yang timbul ialah: (a) sama ada kebenaran responden kedua diperlukan bagi responden pertama untuk mendedahkan dokumen penzahiran; dan (b) sama ada hakim yang bijaksana telah terkhilaf apabila mendapati bahawa imbangan kepentingan awam melebihi tidak mendedahkan dokumen penzahiran.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi:

(1) Hakim yang bijaksana bertindak dengan wajar dengan pendekatan penemuan bahawa dokumen-dokumen penzahiran tersebut relevan dan diperlukan sebagaimana diperlukan oleh A 24 KKM. Ini kerana dokumen penzahiran mengandungi bukti yang berkaitan dengan isu dalam guaman dan mengandungi maklumat yang boleh membantu kes perayu atau merosakkan kes plaintif terhadap perayu (lihat perenggan 12).

(2) Guaman 422 dan 431 telah dimulakan pada tahun 2012 apabila s 148 yang wujud pada masa itu adalah yang diperkenalkan oleh Akta Suruhanjaya Sekuriti (Pindaan) 2010 ('Pindaan 2010') yang mula berkuatkuasa pada 1 April 2010. Pindaan 2010 membenarkan pendedahan tanpa kebenaran responden kedua 'untuk sebarang tujuan undang-undang sekuriti atau untuk tujuan mana-mana prosiding sivil atau jenayah di bawah mana-mana undang-undang bertulis'. Dalam kes ini, pendedahan di bawah Pindaan 2010 adalah dibenarkan kerana dokumen penzahiran diperlukan untuk tujuan undang-undang sekuriti (lihat perenggan 16–17).

(3) Hakim yang bijaksana mengambil kedudukan s 148 yang terkini yang diperkenalkan oleh Akta Suruhanjaya Sekuriti (Pindaan) 2015 ('Akta Pindaan 2015') yang terpakai apabila permohonan penzahiran telah

didengar pada 2 Oktober 2017, 2015 pindaan telah berkuatkuasa. Mahkamah ini tidak boleh bersetuju dengan pandangan hakim yang bijaksana mengenai undang-undang yang terpakai. Hasrat Parlimen adalah dengan jelas untuk memelihara apa-apa hak yang terakru sebelum pindaan melalui s 64 Akta Pindaan 2015. Adalah jelas bahawa 'hak' atau 'keistimewaan' yang diperoleh atau yang terakru di bawah sub-s 64(4) dan (8) Akta Pindaan 2015 termasuk permohonan untuk dokumen penzahiran. Walau apa pun, istilah 'prosiding undang-undang' yang digunakan dalam subseksyen yang sama boleh merujuk kepada permulaan tindakan writ oleh CIMB terhadap perayu pada 30 April 2012 iaitu sebelum tarikh berkuatkuasa. Ia tidak boleh dihadkan pada masa permohonan penzahiran itu difailkan pada 11 Julai 2017. Oleh itu, tiada keperluan untuk persetujuan responden kedua. Atas alasan yang sama, ss 148A dan 148B yang juga diperkenalkan oleh Akta Pindaan 2015 adalah tidak berkesan dan tidak dapat menafikan hak perayu untuk mendapatkan pendedahan (lihat perenggan 18–20).

(4) Kritikan oleh perayu bahawa, alasan *generic* responden kedua untuk menyokong tuntutan imuniti kepentingan awam adalah samar-samar, kosong dan tidak berasas, bukan tanpa merit. Pertama, pendedahan dokumen-dokumen penzahiran tidak mencetuskan imuniti kepentingan awam. Kedua, deponen kepada afidavit yang difailkan oleh responden kedua bukanlah orang yang sesuai untuk mempertimbangkan dengan betul dokumen atau asas untuk menuntut imuniti daripada penzahiran. Ketiga, setelah menentukan bahawa dokumen penzahiran tersebut relevan dan perlu untuk perbicaraan yang adil, hakim yang bijaksana tidak harus menolak perintah untuk pengeluaran tanpa memeriksa dokumen dan mempertimbangkannya berdasarkan material lain (lihat perenggan 32–33 & 36).

(5) Berhubung dengan alasan hakim yang bijaksana untuk menolak penzahiran, mahkamah tidak dapat memastikan bagaimana kuasa siasatan atau pengawasan responden kedua akan terpengaruh kerana ini tidak dijelaskan dalam afidavit. Selanjutnya, sebarang kebimbangan mengenai siasatan masa depan yang terjejas dan keyakinan orang awam terhadap responden kedua yang dilemahkan adalah tidak wajar kerana tiada bukti mengenai sebarang penyiasatan berterusan atau yang akan datang ke responden pertama. Alasan ketiga mengenai kesan benteng adalah bertentangan dengan undang-undang mantap kerana undang-undang dalam bentuk A 24 KKM membenarkan penzahiran dokumen dalam litigasi sivil. Mahkamah berfungsi sebagai pengawal, oleh itu ketakutan terhadap kesan banteng adalah tidak wajar dan tidak berasas. Akhirnya, alasan yang diberikan oleh responden kedua bahawa pihak-pihak mungkin dihalang daripada memberikan bukti adalah spekulatif, merepek dan tidak berasas pada prinsip (lihat perenggan 37–39 & 42).

(6) Penilaian hakim yang bijaksana tentang imbangan kepentingan awam adalah cacat dan keputusan akhir untuk melarang pendedahan tidak disokong oleh prinsip dan bukti. Hakim yang bijaksana telah gagal untuk menimbang kemungkinan kemudaratan bahawa tanpa pendedahan akan menyebabkan pihak memohon penzahiran dan kepada pentadbiran keadilan secara keseluruhan. Hakim yang bijaksana telah mengambil pandangan yang salah bahawa apabila imuniti kepentingan awam dibangkitkan oleh badan berkanun, keputusan tentang sama ada membenarkan atau tidak membenarkan penzahiran itu sememangnya berada di tangan badan berkanun. Kenyataan ini adalah salah dalam undang-undang kerana keputusan muktamad mengenai penzahiran mesti dibuat oleh mahkamah (lihat perenggan 44–45).]

Notes

For cases on discovery of documents, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3445–3459.

Cases referred to

Air Canada and others v Secretary of State for Trade and another (No 2); Pan American World Airways Inc v British Airports Authority and another [1983] 1 All ER 161, QBD (refd)

BA Rao & Ors v Sapuran Kaur & Anor [1978] 2 MLJ 146, FC (refd)

Burmah Oil Co Ltd v Bank of England (Attorney General intervening) [1979] 3 All ER 700, HL (refd)

Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co (1882) 11 QBD 55, CA (refd)

Competition Commission v Nutanix Hong Kong Ltd & Ors (No 2) [2018] 3 HKC 173; [2018] HKCT 1 (refd)

Conway v Rimmer and Another [1968] 1 All ER 874, HL (refd)

D v National Society for the Prevention of Cruelty to Children [1977] 1 All ER 589, HL (refd)

Duncan v Cammell Laird & Co Ltd [1942] 1 All ER 587, HL (refd)

Goodridge v Chief Constable of Hampshire Constabulary [1999] 1 All ER 896, QBD (refd)

Lees v Motor Insurers' Bureau [1953] 1 WLR 620, CA (refd)

SFC v Wong Yuen Yee & Ors [2017] 2 HKC 332 (refd)

Science Research Council v Nasse; BL Cars Ltd (formerly Leyland Cars) v Vyas [1979] 3 All ER 673, HL (refd)

Slaney (Inspector of Taxes) v Kean [1970] Ch 243, Ch D (refd)

Suruhanjaya Sekuriti v Datuk Ishak bin Ismail [2016] 1 MLJ 733, FC (distd)

Wallace Smith Trust Co Ltd (in liq) v Deloitte Haskins & Sells (a firm) and another [1996] 4 All ER 403, CA (refd)

Yekambaran s/o Marimuthu v Malayawata Steel Bhd [1993] MLJU 96; [1994] 2 CLJ 581, HC (refd)

Legislation referred to

British Crown Proceedings Act 1947 [UK]
Capital Markets and Services Act 2007
Companies Act 1965
Interpretation Acts 1948 and 1967 s 77
Rules of Court 2012 O 24, O 24 rr 3, 7, 15
Securities Commission Malaysia Act 1993 ss 148, 148A, 148B
Securities Industry Act 1983

Appeal from: Civil Suit No 22NCC-422–03 of 2012 (High Court, Kuala Lumpur)

Gopal Sreenevasan (Kelvin Seet, Vendee Chai and Lim Lay Yee with him) (Cecil Abraham & Partners) for the appellant.
Ang Hean Leng (Choy Kay Chun with him) (Lee Hishammuddin Allen & Gledhill) for the first respondent.
Lim Chee Wee (Sharon Chong and Joyce Lim with him) (Skrine) for the second respondent.

Harmindar Singh JCA (delivering judgment of the court):

[1] This appeal raises conflicting policy issues in relation to the right of discovery, including what we were told are novel questions of law in Malaysia pertaining to the application of the doctrine of public interest immunity in so far as disclosure of documents is concerned.

[2] The appeal arose as a result of the order of the Kuala Lumpur High Court dated 1 November 2017. The learned judge had dismissed the appellant's ('EY') application for discovery filed pursuant to O 24 r 3 and/or r 7 of the Rules of Court 2012 ('the ROC 2012') ('discovery application'). In that discovery application, EY had sought for documents and information which were made available to the Securities Commission ('SC') during SC's supervisory assessment of the first respondent, SJ Asset Management Sdn Bhd ('SJAM').

[3] We heard the appeal on 5 September 2018. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow and will constitute the judgment of the court.

BACKGROUND

[4] The background facts leading to the discovery application are not disputed and can be stated as follows. SJAM was a small private company

which carried on business as licensed fund manager. In that role, SJAM administered, managed and invested clients' funds in various investments in the global markets. The funds managed by SJAM were held at all times by reputable third party custodian banks.

[5] In August 2009, as part of increased scrutiny of asset management companies, the SC conducted an examination of SJAM ('2009 SC examination'). In April 2010, the SC appointed BDO Consulting Sdn Bhd ('BDO') to attend at SJAM and examine its books, accounts and records ('2010 BDO examination'). The 2010 BDO examination led to an admission by SJAM of certain regulatory breaches.

[6] As a result of SJAM's admission, the SC revoked SJAM's fund manager license on 23 July 2010. BDO was later appointed as liquidator, and in that role reported an alleged discrepancy between the trust assets that had been reported to SJAM's clients and the trust assets held by custodians. SJAM was then wound up in October 2010.

[7] After learning of the discrepancy in trust assets, separate suits were instituted against SJAM and EY. CIMB Investment Bank Bhd ('CIMB'), who had advised its own clients to invest through SJAM, commenced Civil Suit No 22NCC-422–03 of 2012 ('Suit 422') and various other individual investors ('investors'), who used SJAM's services, commenced Civil Suit No 22NCC-431–03 of 2012 ('Suit 431').

[8] CIMB and the investors, for convenience referred together as the plaintiffs, alleged in those suits that the discrepancy in trust assets arose as a result of fraud committed by three defendants, namely:

(a) Tan Whai Oon, the Managing Director of SJAM during the relevant time period;

(b) Annalong Corporation Ltd, a company allegedly associated with SJAM; and

(c) SJAM, the fund manager.

[9] The plaintiffs also pursued a claim against EY, SJAM's auditor, on the basis that EY failed to detect the alleged fraud. EY has denied the plaintiffs' allegations and contends, among other things, that the fraud was not reasonably discoverable.

A THE DISCOVERY APPLICATION

[10] The discovery application, the subject matter of the instant appeal, was filed by EY vide encl 179, to seek disclosure of the following documents ('discovery documents'):

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(a) details and/or documents relating to all investigations and/or examinations by the SC on SJAM, including but not limited to the SC's investigation and/or examination in the 2009 SC examination;

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(b) all reports issued by BDO pursuant to its appointment as independent auditor by the SC on 14 April 2010 ('BDO reports');

(c) documents relating to the SC issuing a notice to show cause on 30 December 2009 to SJAM and subsequent meetings with SJAM following such notice ('SC show cause and meeting documents'); and

D

(d) documents relating to SJAM responding in writing to the SC's notice to show cause ('SJAM response to show cause').

[11] Meanwhile, an application to intervene by the SC was granted by the E High Court on 25 August 2017. After hearing the parties, the discovery application was dismissed by the High Court on 1 November 2017 with costs of RM12,000 to be paid to the SC and RM4,000 to be paid to SJAM.

[12] In dismissing the discovery application, the learned High Court judge F found, firstly, that the discovery documents were relevant and necessary as necessitated by O 24 of the ROC 2012. There is no quarrel about this finding. In any event, we think that the learned judge was justified in coming to this finding as the discovery documents contained evidence relevant to the issues in that suit and contained information which may advance EY's case or damage G the plaintiffs' case against EY (see *Yekambaran s/o Marimuthu v Malayawata Steel Bhd* [1993] MLJU 96; [1994] 2 CLJ 581 and *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55).

H **[13]** The learned judge, however, found that notwithstanding that the discovery documents were relevant and necessary, the said documents fell within the ambit of s 148B of the Securities Commission Malaysia Act 1993 ('the SCMA 1993') and therefore ought not to be disclosed without the authorisation of the SC.

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[14] The learned judge further held that there was no waiver of the SC's authorisation as EY's remedy to challenge the SC's omission (silence) is by way of judicial review. And finally, the learned judge also found that notwithstanding the relevant documents being relevant and necessary, their

disclosure as a class would be injurious to public interest as it would impede the proper functioning of the SC pursuant to the SCMA 1993.

THE INSTANT APPEAL

[15] Before us, the findings of the learned judge and reasons given for dismissing the discovery application were assailed on a number of grounds. These grounds are now the issues for consideration and decision in this appeal. In this regard, we agree that the pivotal issues for consideration in the appeal are whether the SC's authorisation is required in order for SJAM to disclose the discovery documents and whether the learned judge had erred in finding that the balance of public interest favours non-disclosure of the discovery documents.

WHETHER AUTHORISATION OF THE SC IS REQUIRED

[16] The issue of the SC's authorisation arises as a result of the provision relating to the obligation of secrecy advocated by s 148 of the SCMA 1993. Suit 422 and Suit 431 were instituted in 2012 when the s 148 that existed at the time was the one introduced by the Securities Commission (Amendment) Act 2010 (Act A 1369) ('the 2010 Amendment') which came into force on 1 April 2010. The relevant part of that provision reads as follows:

> 148 Obligation of secrecy
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> (1) Except for any of the purposes of the securities law or for the purpose of any civil or criminal proceedings under any written law or where otherwise authorized by the Commission or subject to section 124 of the Evidence Act 1950, any —
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> (a) member of Commission;
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> (b) member of *Shariah* Advisory Council;
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> (c) member or the Audit Oversight Board;
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> (d) member of any committees of the Commission, Shariah Advisory Council or Audit Oversight Board;
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> (e) officer, servant or agent of the Commission; or
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> (f) person attending any meeting of-
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> (i) the Commission;
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> (ii) any committees of the Commission;
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> (iii) *Shariah* Advisory Council; or
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> (iv) Audit Oversight Board,
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> shall not disclose any information which has been obtained by him in the course of his duties and which is not published in pursuance of the securities laws.

[17] As set out in the manner above, the 2010 Amendment allows disclosure without the SC's authorisation 'for any of the purposes of the securities law or for the purpose of any civil or criminal proceedings under any written law'. In the instant case, disclosure under the 2010 Amendment is permissible because the discovery documents are necessary for purposes of the securities laws. The plaintiffs in the High Court rely on the Securities Industry Act 1983 and the Capital Markets and Services Act 2007 to found their causes of action. The discovery documents are also necessary for the purpose of civil proceedings. The plaintiffs' claims in the High Court are founded on common law negligence and breaches of statutory duty under the Companies Act 1965.

[18] However, the learned judge took the position that is was the current s 148 introduced by the Securities Commission (Amendment) Act 2015 (Act A1489) ('the 2015 Amendment'), and which came into force on 15 September 2015, that was applicable as when the discovery application was heard on 2 October 2017, the 2015 Amendment had taken effect.

[19] With respect, we are unable to accede to the learned judge's view on the applicable law. We agree that the regardless of Parliament's intention to widen the secrecy obligations with the 2015 Amendment, Parliament's intention was to clearly also preserve any rights which accrued prior to the amendment through s 64 of the 2015 Amendment Act. The relevant part of s 64 of the 2015 Amendment Act reads:

> 64 Saving and traditional
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> ...
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> (4) Any right, privilege, obligation or liability acquired, accrued or incurred before the effective date or any legal proceedings, remedy or investigation in respect of such right, privilege, obligation or liability shall not be affected by this Act and shall continue to remain in force as if this Act had not been enacted.
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> ...
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> (8) Any right, privilege, obligation or liability acquired, accrued or incurred before the effective date or any legal proceedings, remedy or investigation in respect of such right, privilege, obligation or liability shall not be affected by this Act and shall continue to remain in force as if this Act had not been enacted.

[20] In this context, it was plain to us that the 'right' or 'privilege' acquired or which accrued under sub-ss 64(4) and 64(8) of the 2015 Amendment Act included an application for discovery of documents. In any event, we agree that the term 'legal proceedings' used in the same subsections can refer to the institution of the writ action filed by CIMB Investment Bank against EY on 30 April 2012 which was way before the effective date. It cannot be restricted to the time when the discovery application was filed on 11 July 2017 which was in effect an interlocutory application that emanated from the same writ action

filed by CIMB Investment Bank. It must follow that there is no need for the consent of the SC. For the same reasons, ss 148A and 148B which were also introduced by the 2015 Amendment Act are ineffective and cannot deprive EY of its right to obtain disclosure.

[21] It is axiomatic that the preservation of rights under the 2015 Amendment Act is not unusual or novel as it is consistent with the general rule against retrospective application as formalised under s 77 of the Interpretation Acts 1948 and 1967 as follows:

> 77 Effect of repeal
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> Where a written law repeals in whole or in part any other writer law, then, unless the contrary intention appears, the repeal shall not —
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> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
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> (b) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed; or
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> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or
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> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed; or
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> (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

[22] In coming to this view, we have not overlooked the submissions with regard to the consent order dated 27 July 2016. By this order, parties in Suit 422 had agreed for SJAM to produce certain documents subject to SC's consent. Now, the learned judge appeared to take the view that EY had acknowledged that consent of SC was required for disclosure of the discovery documents.

[23] On this score, we do not think the said consent order precludes EY from pursuing its rights to obtain a disclosure order from the court in the event SC fails to provide the consent. We take the view that EY had not waived its rights to apply for specific discovery if SC had refused to give consent. In other words the consent order cannot be considered to be a commentary on any statutory requirement for consent.

[24] It is trite law that a statement of the law cannot be pronounced by consent (see *Lees v Motor Insurers' Bureau* [1953] 1 WLR 620 and *Slaney*

(Inspector of Taxes) v Kean [1970] Ch 243). In other words, arguments must be heard and an opinion pronounced by the court on a statement of the law. As such, we do not think there was any acknowledgment nor any incongruity in EY's position that the consent of the SC is not a requirement. Since we have indicated that according to the prevailing law no consent of SC was required, the consent order requiring consent has become ineffective.

[25] In view of our decision that no consent of SC is required for disclosure, the arguments on whether EY should have sought a judicial review of SC's non-action or silence with regard to the issue of consent has also become irrelevant. We would, however, observe that the failure of EY to mount any judicial review did not affect its right to pursue an application for discovery against SJAM. The arguments raised in this connection appear to overlook the point that the discovery application was made in the context of a private action between two private parties where the SC is not even a party. It does not affect SC's public functions.

WHETHER DISCLOSURE INJURIOUS TO PUBLIC INTEREST

[26] In addition to finding that the SC's authorisation was required by statute, the learned judge accepted SC's objection to disclosure on the grounds of public interest immunity. The importance of public interest in the context of discovery is echoed in O 24 r 15 of the ROC 2012 which provides that the rules relating to discovery are 'subject to any written law or any rule of law which authorises or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest' (see also *BA Rao & Ors v Sapuran Kaur & Anor* [1978] 2 MLJ 146 and *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733). This proviso probably had its genesis in the British Crown Proceedings Act 1947 which had preserved the so-called 'Crown privilege' as decided by the House of Lords in *Duncan v Cammell Laird & Co Ltd* [1942] 1 All ER 587.

[27] It is inevitable that when public interest immunity is asserted, the court will be faced with competing public interests where disclosure is concerned. On the one hand is the public interest of preventing harm to the nation and the public service by such disclosure of documents. On the other hand is the public interest of promoting the fair and effective administration of justice where harm would be caused if the withholding of material evidence results in the court being unable to make a fair determination of the dispute.

[28] In the context of injury to public interest, in what came to be the leading case on the subject, the House of Lords in *Conway v Rimmer and Another* [1968] 1 All ER 874 ('Conway') held that disclosure could only be ordered if the risk of injury to the public interest is outweighed by the injury to

the public interest in the administration of justice. In other words, a balancing exercise must be carried out to determine on the facts of each case which public interest should prevail.

[29] Based on the decisions in *Conway* and *Burmah Oil Co Ltd v Bank of England (Attorney General intervening)* [1979] 3 All ER 700, Bingham J in *Air Canada and others v Secretary of State for Trade and another (No 2); Pan American World Airways Inc v British Airports Authority and another* [1983] 1 All ER 161 ('Air Canada') summarised the principles to be followed with public interest immunity claims. Although His Lordship's decision to allow disclosure was set aside by the Court of Appeal, the principles stated, as follows, have gained universal acceptance (at p 165):

> 3. The plaintiff's summons seeking production of documents for which the Secretary of State has claimed public interest immunity.
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> Since the decision in *Conway v Rimmer* [1968] 1 All ER 874; [1968] AC 910 the question of public interest immunity has arisen on a number of occasions, most importantly for present purposes in *Burmah Oil Co Ltd v Bank of England* [1979] 3 All ER 700; [1980] AC 1090. From the authorities, and that authority in particular, I derive the following as the principles to be followed where it is sought to withhold documents on the ground that they belong to a class such that their production would be injurious to the public interest and where that claim is contested by a party to the litigation.
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> 1. The first task of the court is to peruse the certificate or document in which the claim for public interest immunity is made in order to satisfy itself (a) that the class to which the documents are said to belong is one recognized as capable of attracting public interest immunity or is at least closely analogous to a recognized class, (b) that there is no reason to believe the documents do not fall within the class claimed, and (c) that the documents themselves and the basis of the claim to immunity have apparently been the subject of proper consideration by an appropriate person. If these conditions are met, in the absence of any contrary indication the court will treat the certificate or claim, not as conclusive, but as motivated by a concern for the public interest which (despite the inevitable difference of viewpoint) is as genuine as that of the court itself. In some cases the nature of the class will virtually conclude the matter (for example, where Cabinet papers or diplomatic dispatches are concerned) but such cases are the exception and are not those which in practice give rise to controversy.
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> 2. If the court is satisfied that the party seeking to withhold the documents has made a valid claim for public interest immunity the next step is to determine whether the party seeking production is able to show a public interest in production. To do so, such party must show not only that the documents are relevant under the *Peruvian Guano* test (a condition which the claim for immunity itself assumes to be satisfied: see *Compagnie Financiers et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55) but that they are necessary for disposing fairly of the cause or

matter or (to put it in a different way) are necessary for the due administration of justice: see the *Burmah Oil case* [1979] 3 All ER 700 at pp 708, 714, 718 and 731; [1980] AC 1090 at pp 1113, 1121, 1125 and 1141. If it appears to the court that the documents are likely to be necessary for the due administration of justice the court is confronted by a second aspect of the public interest, fit to be weighed in the balance against the first.

3. If the court is satisfied that there is a public interest both in production and in non-disclosure it must consider the relative substance of each claim with a view to forming a judgment whether, on balance, the public interest will be better served by the withholding of the documents or by their production. It might be concluded that in respect of some documents the claim for immunity, although properly made, was of relatively little weight (as in the *Burmah Oil case* [1979] 3 All ER 700 at pp 714 and 720; [1980] AC 1090 at pp 1121 and 1128). It might conversely emerge (as it did in the *Burmah Oil* case during argument in the House of Lords) that only very few of the documents were truly necessary for resolving the real issues in the action, and then the claim for immunity would have to be considered in relation to those documents. But the task of the court is to weigh the harm which production would cause to the business of government or public administration against the harm which non-disclosure would do to the just determination of the particular case and decide where the balance of public interest lies.

4. Where the court is of opinion that the balance of public interest lies clearly against production it will not inspect the documents on the off- chance that that conclusion might prove to be wrong if the documents were looked at. But the court may privately inspect the documents, certainly if it is provisionally inclined to order production (see *Conway v Rimmer* [1968] 1 All ER 874 at pp 888 and 900; [1968] AC 910 at pp 953 and 971) but also, it would seem, if careful consideration of the conflicting claims in the absence of the documents leaves the court subject to grave and disquieting doubts as to where the balance lies: see the *Burmah Oil case* [1979] 3 All ER 700 at pp 726 and 734; [1980] AC 1090 at pp 1135 and 1145. If provisionally inclined to order production the court would not ordinarily make that order without first inspecting the documents privately.

[30] In the instant case, the learned judge accepted the SC's submission that the balance of public interest tilts on the side of non-disclosure to protect the effective functioning of the SC pursuant to the SCMA 1993. The following reasons were provided in coming to this conclusion:

(a) it is in the interests of public that the discovery documents be protected as a class to fully protect the investigative and supervisory powers of the SC given that it is inevitable that each document will be based on, or contain references to other similar investigation or supervisory documents;

(b) it would be injurious to public interest if the discovery documents were ordered to be disclosed by this court as this would impede the proper functioning of the SC ie there is a risk that future investigations carried out by the SC may be affected and public confidence in the SC be undermined;

(c) the protection from disclosure afforded to the SC is not limited to a one-off situation involving merely SJAM, as codified in the SCA. On the other hand, a precedent in allowing disclosure of the SC's investigation papers would be established if this discovery application is allowed, resulting in a floodgate effect ie large amounts of subsequent litigation seeking for such a disclosure; and

(d) further, third parties may be discouraged from coming forward to give evidence or from giving evidence fully and freely and likewise it would be important to preserve the integrity and independence of reports made pursuant to the investigations conducted by the SC.

[31] These four grounds given by the SC to oppose disclosure, and which were accepted by the learned judge, were assailed by learned counsel for EY. The criticism advanced by counsel was that the SC's generic reasoning in support of the claim to public interest immunity was vague, bare and unsubstantiated. It was contended that no evidence or reasoning was put forward to establish that the discovery documents belonged to a class which was recognised as capable of attracting public interest immunity. Blanket and bare assertions that disclosure would be injurious to the public interest, it was argued, should be rejected by the law.

[32] After careful consideration, we came to the view that this criticism was not without merit. In the first place, the disclosure of the discovery documents does not trigger any recognisable head of public interest immunity. According to the learned authors of *Disclosure* (4th Ed, Sweet & Maxwell, 2012), the recognised heads of public interest immunity are national security, international relations, workings of central government, other branches of public service, the police and armed forces, confidentiality and informants (at paras 12.17–12.26).

[33] Secondly, as suggested in *Air Canada*, the court must be satisfied that the documents and the basis for the claim to immunity have been properly considered by an appropriate person. We agree with the appellant that the deponent to the affidavit filed by the SC was not the appropriate person to properly consider the documents or the basis for the claim to immunity from disclosure.

[34] The deponent did not seem to be familiar with the effect of the documents and depended upon the solicitors' advice to come to a view that

A disclosure should not be allowed. The reasons given appeared to be that of the SC's solicitors. In the end, the SC's affidavits were lacking in specificity and detail to support the SC's argument that on the facts the documents ought not to be disclosed due to the public interest.

B **[35]** In the same context, we are not persuaded that the SC has led sufficient evidence to justify non-disclosure. For this purpose, the affidavits filed to oppose disclosure must be carefully scrutinised. For instance, the affidavits filed by the SC could have contained an averment that the documents are required for a pending investigation or that disclosure would prejudice an ongoing C criminal prosecution. If there was such an assertion, it would be the duty of the court to consider and if there is sufficient justification, disclosure would be refused. However, there was no such assertion in the present case except for bare, sweeping and unsubstantiated arguments against disclosure which the D court would be unable to accept (see *Competition Commission v Nutanix Hong Kong Ltd & Ors (No 2)* [2018] 3 HKC 173; [2018] HKCT 1).

[36] Thirdly, we agree that after determining that the discovery documents were relevant and necessary for a fair trial, the learned judge should not have E refused to make an order for production without examining the documents and considering them in the light of the other material as advocated in *Goodridge v Chief Constable of Hampshire Constabulary* [1999] 1 All ER 896. The jurisprudence in this respect is settled in that the court should inspect the documents in circumstances where the documents requested satisfy the F ordinary test for production and disclosure is challenged on the basis of public interest immunity (see *Wallace Smith Trust Co Ltd (in liq) v Deloitte Haskins & Sells (a firm) and another* [1996] 4 All ER 403 and *Science Research Council v Nasse; BL Cars Ltd (formerly Leyland Cars) v Vyas* [1979] 3 All ER 673).

G **[37]** Coming now to the reasons given by the learned judge for refusing disclosure, for the first ground, we were unable to ascertain how the investigative or supervisory powers of the SC would be affected as this was not explained in the affidavits. As alluded to earlier, the affidavits only refer in H broad terms to the general investigative and supervisory powers of the SC without providing any particulars.

[38] For the second ground, we must say, with respect, that any concerns about future investigations being affected and public confidence in the SC I being undermined is unwarranted. There was simply no evidence of any ongoing or forthcoming investigations into SJAM. In fact, investigations were already completed with SJAM's licence being revoked and enforcement action taken to wind up SJAM. At least, evidence of any such prejudice to future investigations ought to have been provided in the affidavits.

[39] As for the third ground concerning the floodgate effect, this is against the established jurisprudence as the law in the form of O 24 of the ROC 2012 allows for discovery of documents in civil litigation. Disclosure orders will be made only in the appropriate cases where the legal test has been met. The court functions as a gatekeeper by assessing the merits of each individual application. The fear of the floodgate effect seems to us to be unjustified and unfounded.

[40] In this context as well, the role of the SC must be properly appreciated. The SC must act fairly in that there must be equal access to documents to prevent one party from having a litigious advantage or disadvantage as the case may be. As SJAM has had the benefit of having the documents sought for in the application, the SC's stand in opposing disclosure is rather curious. The documents concerned are no longer confidential. In other words, the documents are no longer with SC alone. As stated earlier, it is pertinent that discovery is only sought against SJAM and not the SC. It is to the benefit of all parties that it is disclosed as to how the fraud had occurred and the reasons why action was taken against SJAM.

[41] In this respect, we agree with the sentiments expressed in the recent Hong Kong case of *SFC v Wong Yuen Yee & Ors* [2017] 2 HKC 332 where the Court of First Instance observed that the proper role of the Hong Kong equivalent of the SC is to make all materials available for potential use in a trial to ensure a just outcome:

> 76. It has to be borne in mind that these are proceedings in which the respondents are faced with an adversary in the form of a governmental regulator which controls the investigatory process. With powers that rank high in the 'hierarchy' of coercive powers for obtaining information and of investigating suspected wrongdoing (see *Stern*, at p 2257D), the Commission occupies a position analogous to criminal law enforcement agencies, with the additional advantage that an interviewee's privilege against self-incrimination is abrogated.
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> 77. Given the status of the Commission as a statutory body established for public functions, it seems to me that the observations of Sopinka J in *R v Stinchcombe*, at p 333h–i are apposite: 'the fruits of the investigation' which are in the Commission's possession are not its own property for use in securing a disqualification order but the property of the public to be used to ensure that justice is done. The proper role of the Commission is not a prosecutor bent on securing the disqualification of a respondent, but a fairminded regulator willing if not anxious to make all materials available for potential use in the trial to ensure a just outcome.
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> 78. The requirement in civil cases that discovery has to be necessary for 'disposing fairly of the cause or matter' directs attention to the question whether one party enjoys a 'litigious advantage' or suffers a 'litigious disadvantage' with reference to access to documents: *Taylor v Anderton* [1995] 1 WLR 447, 462C. The notion of equal access to documents relevant for the preparation of one's case is an important facet of fairness in this kind of case, where the Commission has taken on the role of an investigator. The Commission is not in original possession of any relevant

A information or documents generated by any transaction to which it was party. It has acquired the documents only as a result of its investigation. The respondent is generally not in a position to specify what information and documents the Commission has, other than that which it has chosen to disclose. It is to be questioned whether practical fairness can be achieved if a respondent is required in this context to pinpoint a concrete and specific document or class of documents (so narrowly defined as to contain no irrelevant documents) before he can obtain discovery.

[42] On the last ground, which alluded to third parties from being discouraged to give evidence, again we find this reason given by the SC to be speculative, unsupported and unfounded in principle. There was no evidence that the 2009 SC examination or the 2010 BDO examination relied on any information given by informants. It appears to us from the appointment letter to BDO that the examinations focussed solely on SJAM's books, accounts and records.

[43] Now, the learned judge also appeared to have relied on the case of *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733 in arriving at the conclusion that disclosure must be refused for the effective functioning of departments or organs of central government. With respect, the learned judge's reliance on *Ishak*'s case is misplaced as the present discovery application is in no way concerned with the identity of informants. Unlike *Ishak*'s case, where disclosure of statements made by informants was sought, no such disclosure is sought here. In any event, the discovery documents are in the possession of SJAM and if there are informants involved, SJAM would already be aware of them. So the concerns about the candour of future informants are unfounded.

[44] In the circumstances, we were constrained to hold that the learned judge's assessment of the balance of public interest was flawed and the final decision to disallow disclosure was unsupported by principle and by the evidence. The learned judge had failed to properly weigh the likelihood of harm that non-disclosure would cause to the party seeking disclosure and to the administration of justice as a whole. The learned judge appeared to have taken the mistaken view that once public interest immunity is raised by a statutory body, the decision on whether to allow or disallow discovery is absolutely in the hands of the statutory body.

[45] We hasten to add that this proposition is wrong in law as the final decision on disclosure must lie with the court. It is the independence of the courts which allows them to be best placed to carry out this duty. This much was asserted in *Conway*, where it was pronounced (at p 901):

> In many cases it will be plain that documents are within a class of documents which by their very nature ought not to be disclosed. Indeed, in the majority of cases I

> apprehend that a decision as to an objection will present no difficulty. The cases of difficulty will be those in which it will appear that, if there is non-disclosure, some injustice may result and that if there is disclosure the public interest may to some extent be affected prejudicially. The courts can and will recognise that a view honestly put forward by a Minister as to the public interest will be based on special knowledge and will be put forward by one who is charged with a special responsibility. As Lord Radcliffe said in the *Glasgow Corpn* case (1956 SC (HL) at p 18), the courts will not seek on a matter which is within the sphere and knowledge of a Minister to displace his view by their own; but where there is more than one aspect of the public interest to be considered it seems to me that a court, in reference to litigation pending before it will be in the best position to decide where the weight of public interest predominates. I am convinced that the courts, with the independence which is their strength, can safely be entrusted with the duty of weighing all aspects of public interests and of private interests and of giving protection where it is found to be due.

[46] The courts are entrusted with the duty of being the guardians of the public interest, and in the exercise of this duty, to weigh both the public interest in the administration of justice and other public interests that may arise. The fact that the SC is a public body does not vindicate its failure to give clear, reasoned and valid justifications for its position in resisting disclosure. Bare assertions for non-disclosure will not suffice. In this regard, we are reminded of the observation of Lord Edmund-Davies in *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 at p 616:

> ... Accordingly, it would be unthinkable to vest the judiciary with a power to exclude in its discretion evidence relevant to the issues in civil proceedings merely because one side wants it kept out and the judge thinks that its disclosure is likely to prove embarrassing. In other words, the exclusion of relevant evidence always calls for a clear justification.

CONCLUSION

[47] In the circumstances, and for the reasons we have given, we were persuaded that the decision of the learned judge was plainly wrong and cannot be upheld. The appeal was accordingly allowed and the order of the High Court was set aside. We also ordered the matter to be remitted to the High Court for the learned judge to inspect the discovery documents as its final task in considering the claim for public interest immunity before ordering disclosure.

[48] We also ordered the SC to pay costs of RM12,000 to the appellant EY subject to payment of allocator fees. No order for costs against the first respondent, SJAM. Deposit to be refunded. By agreement of the parties, we also granted a stay of two months of our order pending the application for leave to the Federal Court.

Appeal allowed; order of High Court set aside.

Reported by Dzulqarnain Ab Fatar